(20)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. 361

BARTOL SIKICH, EMMA SIKICH AND TRANSFER REALTY CO., INC.,
Petitioners,

VS.

GLENN W. SPRINGMANN, AS TRUSTEE IN THE MATTER OF BARTOL SIKICH, VOLUNTARY BANKRUPT,
Respondent.

OBJECTIONS TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF OBJECTIONS TO GRANTING WRIT.

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BARTOL SIKICH, EMMA SIKICH and TRANSFER REALTY CO., INC.,

Petitioners,

vs.

GLENN W. SPRINGMANN, As Trustee in the Matter of Bartol Sikich, Voluntary Bankrupt,

Respondent.

OBJECTIONS OF RESPONDENT TO JURISDICTION TO GRANT WRIT.

Respondent, Glenn W. Springmann, as Trustee, in the Matter of Bartol Sikich, Bankrupt, respectfully objects to the jurisdiction of the court to grant a writ of *certiorari,* asserted by the petitioner for the following reasons:

1. The statement of facts presented with the petition does not *show* that the nature of the case and the rulings in the state court were such as to bring the case within

the jurisdictional provisions relied on, nor does it include a statement of the grounds upon which it is contended that the questions involved are substantial.

2. No real or substantial federal question is presented for the consideration of the court.

3. The federal questions presented are so frivolous as to indicate that the only purpose of the petition for a writ of *certiorari* is delay.

4. The petition for the writ of *certiorari* discloses that the federal questions presented by the petition have been so explicitly settled and decided by this court against petitioners' contention and foreclosed by previous decisions of this court, as leave no room for controversy.

WHEREFORE, the respondent respectfully prays the petition for a writ of *certiorari* be denied, and that he be awarded damages in addition to interest on the judgment for the reason that it appears that the only purpose of the petition is delay.

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BRIEF OF GLENN W. SPRINGMANN, TRUSTEE RESPONDENT, IN SUPPORT OF OBJECTIONS TO GRANTING WRIT OF CERTIORARI.

Respondent's Statement of Case, Including Objections and Corrections of Petitioners' Statement.

The statement presented by the petitioners disclosing the basis upon which they contend this court has jurisdiction to review the judgment in question fails to conform to the Rule 12 (1) of this court in the following particulars:

1. It does not show the way the trial court passed upon the petitioners' motion to dismiss, claimed to have been filed at the close of plaintiff's case, and renewed at the close of all the evidence, or that the trial court passed upon such motions.

2. It does not specify the stage of the proceedings in the Supreme Court of Indiana, or the manner or method in which the federal questions sought to be reviewed, were raised in the Supreme Court of the state, and it also fails to state the way such questions were passed upon by the Supreme Court of Indiana.

3. It fails to make pertinent quotations of specific portions of the record, or summary thereof, with specific references to the record where the matters appear with regard to the rulings of the trial court upon any motion to dismiss at the close of plaintiff's case, or at the close of all the evidence, and it likewise fails to make such quotations with reference to the record, where the ruling of the Supreme Court of Indiana appears as will support the assertion that the rulings of the trial court and of the Supreme Court of the state were of a nature

to bring the case within the statutory provisions believed to confer jurisdiction on the court.

4. It does not set out the allegations of the complaint disclosing the nature of the case, and which show that the Transfer Realty Company, Inc., and Emma Sikich were in possession of the property in question, under claims of ownership and that their possession and claims of ownership were adverse to the bankrupt estate.

5. It does not include a statement of the grounds upon which it is contended that the questions involved are substantial.

6. No copy of the opinion of the Supreme Court of Indiana delivered upon rendering the judgment sought to be reviewed is set out in the petition.

7. It does not accurately state the parts of the record essential to a ready and adequate understanding of the points requiring the attention of the court.

These Failures Necessitate a Restatement By Respondent.

The Complaint.

Omitting the formal allegations of the complaint, it alleges the incorporation of the Transfer Realty Company, Inc., (hereafter referred to as Realty Company), on February 8, 1932, and the conveyance and delivery by Bartol Sikich, his wife joining, of all real estate then owned by him, to the said Realty company. That he also turned over and delivered to the Realty company numerous notes, bonds, mortgages and other evidences of indebtedness (R. 102-3). That all the money and property received by the company after its incorporation was and remained the property of Bartol Sikich, and became

the property of the plaintiff upon his qualification as trustee of the bankrupt estate, and that he, plaintiff, was the owner of all the property where the title was in the Realty company (R. 105).

It also alleged that after February 8, 1932, Bartol Sikich caused other real estate to be conveyed to the company, which is followed by a description of Fourteen parcels of real estate so conveyed (R. 105). That he purchased and received in exchange for other property certain evidences of debts, some of which he transferred, assigned and delivered to the Realty company and some of which he transferred, assigned and delivered to petitioner, Emma Sikich. This is followed by a list of real estate bonds and notes secured by mortgages which were alleged to have been so transferred and delivered, amounting to the sum of $152,257.86 (R. 106-111). That the defendant, Emma Sikich claimed to be the owner of all the said evidences of indebtedness so assigned, transferred to her and to the Realty company (R. 111).

That the defendants, Realty company and Emma Sikich, through Bartol Sikich, have collected and received interest on the above described notes, bonds and evidences of indebtedness in an amount not known to the plaintiff (R. 111-112). That in like manner they received a large number of Home Owners' Loan Corporation Bonds, in a sum of over $6,000.00, a list of which was set out (R. 112, 113).

That all monies, notes, bonds and other evidences of indebtedness received by the Realty company since June 1, 1935, were received by it as the proceeds and income from property owned by the bankrupt, June 1, 1935, (that being the day when he filed his petition in bankruptcy), and that the same should be delivered, assigned and conveyed to the plaintiff as such trustee (R. 114).

"That all of the interest, rents and income from all of the property hereinbefore mentioned, whether real, personal or mixed, whether received by the defendant, Emma Sikich or by the defendant, Transfer Realty Company, Inc., in truth and in fact belonged to and was the property of the defendant Bartol Sikich on the first day of June, 1935, and at the time when plaintiff was appointed trustee as hereinbefore alleged," and that the Realty company and Mrs. Sikich should be required to account to plaintiff for such income (R. 115).

Complaint Amended.

During the trial and before the evidence was concluded, the plaintiff by leave of court amended his complaint to correspond with the evidence by inserting therein the following:

> *"That the defendant, Transfer Realty Company, Inc., as a corporation, and as a legal entity, and the defendant, Emma Sikich, each claim to be the owner of, and are in possession of the notes, bonds, evidences of indebtedness, monies and real estate hereinbefore mentioned; that the defendant, Emma Sikich claims to be the owner of and is in possession* of the capital stock of said Transfer Realty Company, Inc., and of all the certificates evidencing the capital stock of said Transfer Realty Company, Inc., except for one share, the certificate for which is held by the defendant, Bartol Sikich; *that the claims of said ownership and the possession of defendants Emma Sikich, and of the Transfer Realty Company, Inc., are without right and are held by them and each of then adversely to the rights of the plaintiff."* (R. 7, 116). (Italics ours.)

Other Corrections and Explanations.

The original complaint was filed in the Lake Circuit Court, November 2, 1936 (R. 100), and not in Lake Superior Court, November 1, 1936, as stated by petitioners.

Petitioners on page 2 of their petition have devoted 7 lines to a statement of the special finding covering 110 pages of the printed record. They have devoted 6 lines to the judgment covering 5 pages of the printed record. They have given no space to the Thirteen Conclusions of law covering 8 pages of the printed record.

The court did not, as stated by the petitioners on page 2 of their petition, find and adjudge that all of the realty conveyed to the Realty company, February 8, 1932, was the property of Bartol Sikich on June 1, 1935, that being the day when he filed his petition in bankruptcy. There are 11 descriptions of real estate described in the complaint comprising 25 city lots, which were alleged to have been conveyed to the Realty company, February 8, 1932. The court found that on June 1, 1935, Bartol Sikich owned the real estate included in 7 of such descriptions, and that on June 1, 1935, he was the owner of 9 other parcels of real estate purchased after February 8, 1932, where the title had been taken in the name of the Realty company.

Realty Company Not Engaged in Business.

The Transfer Realty Company did not, as stated by petitioners, after its organization engage "in the purchase of mortgages, notes and other evidences of indebtedness secured by mortgages on real estate, borrowed money, and the corporation petitioner was engaged in such business at the time petitioner, Bartol Sikich, was adjudicated a voluntary bankrupt."

A reference to the special findings mentioned by petitioners disclose that it was Bartol Sikich, and not the Realty company, who purchased all real estate, mortgages, notes and other evidences of indebtedness.

There is no finding that the Realty company ever purchased any property of any kind, or that it ever engaged in any business. The only legitimate inference that can be drawn from the findings is that it was never engaged in any business. In the last rhetorical paragraph of special finding No. 7 (R. 18) the court found "that at all times from and after the incorporation of the Transfer Realty Company, Inc., up to and on June 1, 1935, all of the property of every kind and nature which was held in the name of said corporation, was the property of Bartol Sikich."

In each and every instance where the court found that Bartol Sikich was the owner of certain property, June 1, 1935, it also found that the Realty Company and Emma Sikich each claimed to be the owners of such property, and that their claims were adverse to the rights of this respondent, except as such claims related to the rights of Emma Sikich as the wife of Bartol Sikich.

No Personal Judgment Against Realty Company.

Petitioners refer to the fact that no personal judgment was rendered against the Realty company, but they do not contend that that has any bearing on the question of jurisdiction.

In finding 62, (R. 89), it is found that "the defendants, have ever since June 1, 1935, claimed and now claim that all of the real estate which the court has found was the

property of Bartol Sikich, on June 1, 1935, was the property of the defendant, Emma Sikich on June 1, 1935, and that the defendant, Bartol Sikich, was not on June 1, 1935, the owner of said real estate or any part thereof",—and this finding was made July 25, 1941, after 91 days had been devoted to the trial of this case.

The court in finding 64 (R. 99) found that claims against the bankrupt estate had been filed and allowed in a sum in excess of $30,000.00; that the assets listed by the bankrupt were of no value on June 1, 1935, and were still of no value, and that it was necessary in order to pay the debts of the bankrupt, that all the property, real, personal and mixed, which the court found was owned by the bankrupt on June 1, 1935, and the net income therefrom should be turned over to this respondent to be by him administered as such trustee.

The court in finding No. 62 (R. 89-99) found that Emma Sikich had, prior to July 25, 1941, (the date when the judgment was entered), collected and received, as income and proceeds from the property which the court found was owned by Bartol Sikich on June 1, 1935, a total of $30,140.11; that after giving her credit for all expenses and after deducting her share, as wife of the bankrupt, there was a balance of $13,892.30, which belonged to this respondent as trustee of the bankrupt estate; that she and her husband had appropriated the same to their own use and benefit, and that they should also account for interest in the aggregate sum of $3,519.50, and judgment was entered accordingly.

Some of this money was collected by Emma Sikich personally, some by Bartol Sikich for her and by him

delivered to her. No part of it was collected or received by the Realty company, so no personal judgment was entered against it.

Opinion of State Court Not Set Out.

The Supreme Court of Indiana handed down its first opinion May, 20, 1943. Rehearing was denied June 16, 1943, at which time another opinion was handed down modifying the first opinion. The opinion as modified is reported in 48 N. E. (2) pages 808 to 810. Petitioners have failed to append a copy of either of such opinions to their statement as required by Rule 12 (1) of this court.

This is a salutary rule. It enables the court, without having to examine the record, to determine whether the decision and opinion of the state court is in conflict with any prior decision of this court, and is in keeping with the prevalent rule of appellate procedure, that the appellate tribunal will not search the record in order to reverse the judgment of a lower court.

Petitioners' failure to comply with this provision of the rule is another reason why their petition is not sufficient to invoke the jurisdiction to issue the writ of *certiorari.*

ARGUMENT.

Before entering upon a discussion of the alleged federal questions 1, 11 and 111 stated on pages 7 and 8, and Points A, B and C in petitioners' argument, we will discuss the insufficiency of the petition to present any federal question sufficient to confer jurisdiction on the court to grant the writ.

Point 1.
The Petition Is Not Sufficient.
Summary.

The petition does not comply with Rule 12 (1) of this court, in that, it does not accurately and adequately present that which is essential to the ready and full understanding of the points and questions attempted to be presented. The reasons are too numerous to be stated in this summary.

Nature of Case.

The nature of the case cannot well be disclosed except by a reference to the averments of the complaint, which we will do with the brevity consistent with accuracy and clearness.

The only reference made by petitioners to the averments of the complaint appears on page 5 of the petition, where less than ten lines are devoted to the complaint and its averments, though the complaint covers 16 pages of the printed record (R. 101-117).

We are not going to charge petitioners with unfairness in their statement of the allegations of the complaint, or with an intentional concealment of the real issues. We will concede the petition complies with the rule in so far as *brevity* is concerned. But, in so far as accuracy and clearness are concerned, we will refer to and quote from the complaint as it appears in the record, and let the facts speak for themselves.

The Complaint.

We have hereinbefore set out the material averments of the complaint showing the nature of the case, to which reference is here made. We will, however, restate some of the averments as concisely as we can.

It is alleged that on February 8, 1932, the bankrupt, Bartol Sikich, caused the Realty company to be incorporated under the laws of the State of Indiana; that the incorporators were Bartol Sikich, his wife, Emma Sikich, and his attorney (R. 102).

That on February 8, 1932, the bankrupt, his wife joining, conveyed the real estate then owned by the bankrupt to the Realty company. (R. 102); that thereafter at dates unknown he caused deeds to be executed conveying other real estate to the company (R. 102-3); that after February 8, 1932, he "turned over and delivered" to the Realty company numerous notes, bonds, mortgages and other evidences of indebtedness then the property of the bankrupt for which the company paid nothing (R. 103); that thereafter the bankrupt was in control of the business of the Realty company (R. 103); that the company was a name which he used in his business; that all the property and monies received by the Realty company

was and remained the property of Bartol Sikich until the appointment of this respondent as trustee of the bankrupt estate, since which time respondent was the owner of such property and money and entitled to its possession (R. 104).

That since February 8, 1932, the bankrupt conveyed and caused to be conveyed other real estate to the Realty company, describing 14 parcels (R. 105); that he purchased and received in exchange for other property certain evidences of indebtedness, believed to be notes, and bonds secured by mortgages, some of which he caused to be transferred, assigned and *delivered* to his wife, and some to the Realty company (R. 106), followed by list of bonds aggregating to more than $150,000.00, all of which in fact were owned by the bankrupt, and that the defendant, Emma Sikich, claimed to own all of such evidences of indebtedness so transferred, assigned and delivered to her and to the Realty company (R. 111); that the Realty company and Emma Sikich through her husband, had collected and received interest on such evidences of indebtedness, and also rent from the real estate (R. 111, 112); that they had also in like manner exchanged sold and assigned some of the notes, and bonds, and had received cash therefor (R. 112); that the Realty company and Mrs. Sikich had in like manner received a large number of Home Owners Loan Corporation Bonds, with a list of the same aggregating more than $6,000.00 (R. 112).

That all the property purchased by the bankrupt prior June 1, 1935, was the property of the bankrupt; that all monies, bonds and evidences of indebtedness received by the Realty company after June 1, 1935, was received by it as proceeds and income from property owned by the bankrupt on June 1, 1935 (R. 113).

That all the interest, rents and income received by Mrs. Sikich or the Realty company belonged to and was owned by Bartol Sikich on June 1, 1935, and that they should be required to account to plaintiff for the principal of said evidences of indebtedness, and also for the interest, rent and income so received by them (R. 114, 115).

Complaint Amended to Conform to the Evidence.

During the trial and before the evidence was concluded, the plaintiff, by leave of court amended his complaint, by inserting therein just before the prayer, the following words, which we quote in full (R. 116):

> *"That the defendant, Transfer Realty Company, Inc., as a corporation, and as a legal entity, and the defendant, Emma Sikich, each claim to be the owner of, and are in possession of the notes, bonds, evidences of indebtedness, monies and real estate hereinbefore mentioned; that the defendant, Emma Sikich, claims to be the owner of and is in possession of the capital stock of the defendant, Transfer Realty Company, Inc., and of all the certificates evidencing the capital stock of said Transfer Realty Company, Inc., except for one share, the certificate for which is held by the defendant, Bartol Sikich; that the claims of said ownership and the possession of the defendants, Emma Sikich, and of the Transfer Realty Company, Inc., are without right and are held by them and each of them adversely to* the rights of the plaintiff" (R. 116). (Italics ours.)

Since present counsel entered this case after the entry of the judgment in the trial court, they may want to be excused for not mentioning the above amendment.

The failure of the petitioners to refer to the averments of the complaint relating to the transfer and delivery of the property to the Realty company and to Mrs.

Sikich, before June 1, 1935, and their adverse claims of ownership is so manifest that further comment is not necessary.

Petition for Writ Must Be Carefully Prepared.

A petition for *certiorari* must be carefully prepared, with strict accuracy, brevity and clearness.

We cannot possibly present this proposition in more emphatic language than was used by this court in *Furness Withy & Co.* v. *Yang-Tsze Ins. Ass'n,* 242 U. S. 430, 433, 434, 61 L. Ed. 409, 414, where the court called attention to the fact that it was incumbent upon counsel to see that the petition discloses the real situation, and on page 434, referring to a petition for *certiorari,* said:

> "Unless these carefully prepared, contain *appropriate* references to the record, and present with *studied accuracy, brevity, and clearness* whatever is essential to ready and adequate understanding of the points requiring our attention, the right of interested parties may be prejudiced and the court will be impeded in its efforts to properly dispose of the causes which constantly crowd its docket."

This Court, *Wisconsin, M. & P. R. Co.* v. *Jacobson,* 179 U. S. 287, 294, 45 L. Ed. 194, 198, served notice on parties and counsel that they must comply with the rules of the court, when on page 294, it said:

> "We shall hereafter insist upon a strict compliance with the terms of the rule as amended."

In *Magnum Import Co.* v. *Coty,* 262 U. S. 159, 163, 67 L. Ed. 922, 924, the court said:

> "The jurisdiction was not conferred upon this court merely to give the defeated party in the Cir- Court of Appeals, another hearing; our experience

shows that 80 per cent of those who petition for *certiorari* do not appreciate these necessary limitations upon our issue of the writ."

And continuing on page 164, the court said:

"These remarks, of course, apply also to applications for *certiorari* to review judgments and decrees of the highest courts of states."

Defects in Petitioners' Statement.

We have heretofore in our Statement of the Case pointed out the defects in the petition. These defects concisely stated are:

1. The petition does not set forth any statutory provision believed to sustain the jurisdiction of the court.

2. It does not set out the statutory provision mentioned verbatim, nor is it summarized.

3. It does not state when or how the questions sought to be reviewed were raised in the Supreme Court of the state.

All that is said about this is, that the question, "was raised by a motion to dismiss at the close of plaintiff's case (R. 86-88), was renewed at the close of all the evidence (R. 102-104); was urged on appeal in the Supreme Court of Indiana (R. 11)," and is urged here. See petitioners' brief page 5.

When or how it was "urged" in the Supreme Court of the state is not disclosed. It may have been first "urged" on petition for rehearing after judgment of affirmance, and if that were true, it would have been too late to present any question, as want of jurisdiction must be presented before judgment.

Loeber v. *Schroeder,* 149 U. S. 580, 585, 37 L. Ed. 856, 859.

Turner v. *Richardson,* 180 U. S. 87, 45 L. Ed. 438.

Meyer v. *Richmond,* 172 U. S. 82, 43 L. Ed. 374.

Indeed it is not shown that either the trial court or the Supreme Court of the state made any ruling on the question.

4. The petition does not include "a statement of the grounds upon which it is contended that the questions involved are substantial" as is required by Rule 12, paragraph 1 of this court, and as held in:

McArthur v. *United States,* 315 U. S. 787, 86 L. Ed. 1192.

Zucht v. *King,* 260 U. S. 174, 177-8, 67 L. Ed. 194, 198.

Petitioners have disclosed that 91 days were taken up in the trial of the case, but the court is not advised as to the evidence introduced, nor what transpired during the trial.

The rules of the Court require the *giving* of information, not concealing it. Not a word of information is given concerning the amendment of the complaint to correspond with the evidence, nor the allegations of the complaint wherein it is alleged that Bartol Sikich prior to bankruptcy conveyed and delivered the real estate to the Realty company, and personal property to his wife, and that their claims were adverse to the rights of this respondent as trustee. May we ask why this failure? Certainly not for purpose of giving information.

Motion to Find for Petitioners.

The petition on page 6 asserts that a designated question "was duly presented in the trial court by a motion to find for these petitioners (R. 87, 88, 103, 104), by exceptions to conclusions of law (R. 304)," and was "urged by assignment of errors in the Supreme Court of Indiana (R. 11-13)."

In answer to this statement this respondent says no such motion was ever presented to the trial court, much less ruled on by the trial court, and no such question was ever presented to or ruled on by the Supreme Court of Indiana. Even if such a motion was made, it presented no question. When the facts are found specially a motion to find for either party is not proper.

Ex Parte Walls, 73 Ind. 95, 110.
City of Lafayette v. *Allen,* 81 Ind. 166, 169, 170.

If petitioners had with "accuracy" and "clearness" truly stated the facts, they would have disclosed want of jurisdiction to issue the writ, and it is difficult to believe such failure was due to an oversight, or lack of knowledge of what is required by the rules of this court.

There are Twenty conclusions of law, none of which are mentioned in the petition, and there is no showing that an exception was taken to any of them, as must be done under the law of Indiana, in order to present any question on appeal.

Point 2.
Addressed to Petitioners' Point A.
In re Motions to Dismiss.

While petitioners have not specifically set out the action of the trial court in overruling their motions to dis-

miss, as reasons for reviewing the judgment, they do say that the action of the court in so ruling was presented below and is also presented in this court. They have caused the record showing these motions and the ruling of the state court to be made a part of the printed record, and doubtless will hereafter undertake to present some question in relation to such motions. We do not believe any question is in fact presented in relation to such motions, but we will not overlook them.

* * * * *

Summary.

A motion to dismiss cannot perform the office of a demurrer under the Civil Code of Indiana, because if the motion is sustained it deprives the party of the right to amend.

* * * * *

The Civil Code of Indiana, provides that want of jurisdiction of the subject matter shall be cause of demurrer to the complaint. Section 85 of An Act Concerning Civil Procedure, Acts 1881 (Spec. Sess.) at page 255, as amended in 1911, Chap. 157, Section 2, page 415, provides:

> "The defendant may demur to the complaint when it appears upon the face thereof, either,
>
> "First. That the court has no jurisdiction of the defendant or the subject of the action."

Both the Supreme and Appellate Courts of Indiana, are committed to the rule that a motion to dismiss or strike out a complaint cannot take the place of a demurrer.

In *Guthrie* v. *Howland,* 164, Ind. 214, 221-2, the trial court sustained a motion to strike out and dismiss a complaint. This ruling was reversed, and in so doing the Supreme Court said:

"A motion to strike out, like a motion to dismiss, will reach formal defects only and will not be allowed to take the place of a demurrer."

In *Huffman* v. *Newlee,* 189 Ind. 14, 26, the court said:

"The want of jurisdiction in the court over the subject-matter of the proceeding was properly raised by demurrer under section 344 Burns 1914, Acts 1911, page 415. The motion to strike out could not perform the office of the demurrer in this regard, and was properly overruled."

The Appellate Court of Indiana, in *Minor* v. *Summer,* 80 Ind. App. 269, 271, in discussing this subject said:

"It is well settled that a motion to strike out cannot perform the office of a demurrer, as the pleader would thereby be deprived of an opportunity to amend. * * *

"If, however, the facts are so palpably irrelevant to the matter in controversy that the pleading could not, by amendment, be made germain to the controversy, it would not be reversible to strike it out."

In *Chicago etc., R. Co.* v. *Dunnahoo,* 63 Ind. App. 237, the court stated the rule as follows:

"If the averments tend to state a cause of action or defense, though the pleading may be insufficient in substance when duly tested by demurrer, it should not be stricken out; for the party has the right to amend after a demurrer has been sustained, and this right is cut off when the pleading is struck out."

It is on the strength of these decisions that the respondent insists that the trial court committed no error in overruling the motions to dismiss. It does not appear that the question was presented to the trial court in any other manner.

Ruling on Motions to Dismiss Not Presented.

The action of the trial court in overruling the motions to dismiss is not mentioned in the petition or brief in support thereof, as one of the questions presented for review by this court. The only place where the motions to dismiss are mentioned is on page 5 of the petition where it is said the question whether the court had jurisdiction of the subject matter was "raised by a motion to dismiss at the close of plaintiff's case" and renewed at the close of all the evidence.

Respondent insists that no question relating to the action of the court on the motions to dismiss is presented to this court for determination in passing upon the question of jurisdiction to issue the writ of *certiorari*.

Point 3.
Addressed to Petitioners'.
Point A.

Summary.

Bankrupt court is without jurisdiction to adjudicate a controversy relating to the ownership of property held by a third person, adversely to the estate of the bankrupt, without consent of the claimant.

* * * * *

The complaint in the instant case alleged, and the court found, that the Realty company and Emma Sikich at the time Bartol Sikich filed his petition in bankruptcy, held property belonging to the bankrupt estate under adverse claims of ownership.

This court has on numerous occasions held that an action by the trustee of a bankrupt estate to determine

the title to, and to recover such property must be sought in a plenary action,—absent consent of the claimant. That question is so well settled that it is no longer open to controversy.

See *Taubel-Scott-Kitzmiller Co.* v. *Fox,* 264 U. S. 426, 433, 68 L. Ed. 770, cited by petitioners. We quote from pages 433, 434 of that opinion:

> "Whenever the bankruptcy court has possession, it could, under the act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision e of section 67, under subdivision b of section 60, and under subdivision e of section 70. But in no case where it lacked possession could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim."

It was on the strength of the above case that the Supreme Court of Indiana affirmed the judgment of the trial court.

The "additional jurisdiction conferred on the federal court by the amendment of 1903, was not to be exercised by summary process, but by regular plenary action. Therefore, the summary jurisdiction exercisable by the bankruptcy court was not enlarged whatever by the amendment of 1903, but was left precisely as it existed prior to the amendment."

5 Remington on Bankruptcy, Section 2135, page 261, citing *Taubel-Scott-Kitzmiller* v. *Fox, supra.*

That the bankruptcy court did not have jurisdiction to summarily order the Realty company and Mrs. Sikich

to turn the property in question over to the trustee, is amply supported by the following cases:

Thompson v. *Magnolia Petroleum Co.,* 309 U. S. 478, 481, 84 L. Ed. 876, 879;

Steelman v. *All Continent Corp.,* 301 U. S. 278, 286, 81 L. Ed. 1085, 1090;

Harris v. *Avery Brundage Co.,* 305 U. S. 160, 163, 83 L. Ed. 100, 102;

Taylor v. *Sternberg,* 293 U. S. 470, 473, 79 L. Ed. 599, 602;

May v. *Henderson,* 268 U. S. 111, 115, 69 L. Ed. 870, 873;

First National Bank v. *Chicago T. & T. Co.,* 198 U. S. 280, 289, 49 L. Ed. 1051, 1054-5.

Mueller v. *Nugent,* 184 U. S. 1, 15, 46 L. Ed. 405;

Louisville Trust Co. v. *Comingor,* 184 U. S. 18, 24, 46 L. Ed. 413, 415.

This Is An Unusual Case.

Petitioners assert there were no adverse claimants. Such an argument comes with ill grace after a trial on the merits lasting 91 days followed by an appeal to the Supreme Court of the State and by the present proceeding in this court. They now ask this court to determine that their claims that the property was not the property of the bankrupt, and that it was the property of the Realty Company and Mrs. Sikich were not made in good faith, notwithstanding the judgment of the trial court that their claims were adverse.

A Parallel Case.

It is very unusual for a defendant in a plenary action by a trustee, to claim that the court is without jurisdiction for the reason that the sole jurisdiction was in the court of bankruptcy to enter a summary order. The only case we have been able to find where such a position was taken is *Levy* v. *Miller,* 48 R. I. 250, 137 Atl. 7.

That was an action in ejectment by Levy, trustee of the estate of one Miller, bankrupt, against the bankrupt and his wife. It was contended there that the bankrupt could have no adverse claim and that the wife claimed no right to possession. The language of the court is so apt and pertinent, that we quote, inserting "Sikich" for "Miller" and "Springmann" for "Levy".

> "When the Sikichs suggest that summary proceedings against themselves in the federal court are the only means of which Springmann may oust them from possession, they ask us either at the outset to discredit their making an honest adverse claim in the superior court or to make the court's jurisdiction dependent on the facts found at the trial that their claims were not honestly adverse. Their claim may have been absurd, but the record leads us to believe that they made it in good faith. Under such circumstances, it is idle to say that, because the trustee gave the defendants the benefit of a presumption of an adverse claim, made in good faith, and proceeded by plenary suit in the state court, such court was without jurisdiction."

If petitioners can find a case in point holding otherwise we presume they will furnish the court with the citation.

Respondent insists that there is no merit whatever in the petition for the writ of certiorari, and that it should be denied for want of jurisdiction.

Adverse Claim Defined.

A claim may be adverse though based on false testimony or originates in a fraudulent transaction.

In re Yorkville Coal Co., 211 Fed. 619.

"A claim is adverse if the evidence offered has a basis for and is sufficient, if not controverted to establish the validity of the claim."

In re Fuller and McGee, 294 Fed. 71.

If the claimant sets up as facts matters which, if true, would constitute a statement of an adverse claim, then the claim would be adverse, and not colorable, and not within the jurisdiction of the referee.

In re Blum, 202 Fed. 883, 884.

Point 4.

Addressed to Questions 1, 11 and 111, And to Point A of Argument.

Summary.

The averment of the complaint that the bankrupt was on a certain date the owner of certain property did not present a federal question.

* * * * *

The complaint averred that at the time Bartol Sikich filed his petition in bankruptcy he was the owner of certain property, which he had prior thereto transferred, assigned and delivered to the Realty Company and to his wife, and that they claimed to own such property adversely to the bankrupt estate.

The decision of the trial court that the bankrupt owned such property when he filed his petition, and the appli-

cation by the court of the evidence in reaching such decision did not present a federal question.

It was so held by this court in *McKenna* v. *Simpson*, 129 U. S. 506, 512, 32 L. Ed. 771, 774, where this court said:

> "The decision of a state court as to what is thought to be a secret trust does not present a federal question, nor does the application by the court of the evidence in reaching that decision present a federal question."

Neither the Realty Company nor Mrs. Sikich claimed title under any federal law.

Spencer v. *Duplan Silk Co.*, 191 U. S. 526, 48 L. Ed. 287, was an action by a trustee in bankruptcy in trover for the alleged conversion of certain lumber and building material alleged to have been the property of the bankrupt. The court in discussing this question said (p. 531):

> "It is true that if the lumber and materials belonged to Bennett and Rothrock, on January 13, 1900, plaintiff in error succeeded to the title of the firm on adjudication; but the question of Bennett and Rothrock's ownership on that day in itself involved no federal controversy and the mere fact that the plaintiff was trustee in bankruptcy did not give jurisdiction."

The question before the state court in the case at bar, was Did Bartol Sikich have title to the real and personal property involved? And as said in *Scott* v. *Kelley*, 89 U. S. 57, 59, 60, 22 L. Ed. 729, 730:

> "The question presented for the decision of the State Court was not whether, if the bankrupt had title it would pass to his assignees by operation of the Bankrupt Act, but whether he had title at

all. The court decided he had not. Such decision by a state court does not present a question of which this court can take jurisdiction upon a writ of error."

Alleged errors of a state court which involved questions of fact or state, and not of federal laws are not reviewable on petition for certiorari.

Quinby v. *Boyd,* 128 U. S. 488, 489, 32 L. Ed. 502, 503.

And in *Thompson* v. *Fairbanks,* 196 U. S. 516, 523, 49 L. Ed. 577, 585, cited by petitioners, this Court said:

"The question whether any conveyance etc., was in fact made with intent to defraud creditors, when passed upon in the state court, is not one of federal nature."

"Nor does this court sit to review the finding of facts made in the state court, but accepts the finding of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within jurisdiction conferred upon this court."

Waters Pierce Oil Co. v. *Texas,* 212 U. S. 86, 97, 53 L. Ed. 417, 424, 425.

Dower v. *Richards,* 151 U. S. 658, 672, 38 L. Ed. 305, 310, is to the same effect.

Neither the Realty Company nor Mrs. Sikich claimed to own any of the property under a federal law, and as said by this court in *California Powder Works* v. *Davis,* 151 U. S. 389, 395, 38 L. Ed. 206, 208:

"Any court, whether state or federal, having jurisdiction of the subject matter of the action, was free to act in the premises."

Respondent insists that the question as to the character of the title to the property held by the Realty Company and Mrs. Sikich, whether they held title under a secret trust or otherwise for the bankrupt did not present a federal question sufficient to confer jurisdiction on this court to grant a writ of certiorari.

Point 5.

Addressed to Point A in Petitioners' Argument.

Summary.

State courts have exclusive jurisdiction of a suit brought by a trustee in bankruptcy against a person, other than the bankrupt, holding title to property transferred prior to bankruptcy, in secret trust for the bankrupt, and that jurisdiction of such cases has not been conferred on federal courts.

* * * * *

Bartol Sikich caused the Transfer Realty Company to be incorporated. Its capital was divided into 100 shares. A certificate for 60 shares was issued to him. A certificate for 20 shares was issued to Mrs. Sikich, and one for 20 shares was issued to an attorney, who immediately assigned such certificate in blank and delivered it to Bartol Sikich (R. 11). The certificate for 60 shares issued to Bartol Sikich was later surrendered and a certificate for 59 shares was issued to Mrs. Sikich, and one for one share issued to Bartol Sikich. The certificate for 20 shares issued to the attorney was surrendered and later a certificate for those shares was issued in the name of Mrs. Sikich (R. 13). On June 1, 1935, when the petition in bankruptcy was filed Bartol Sikich held a certificate for one share, and Mrs. Sikich *held* certificates for 99 shares of such stock.

The complaint alleged that Mrs. Sikich claimed to be the owner of and was in possession of certificates for 99 shares of such stock (R. 116). The court found (Finding 4, R. 13) that the stock represented by the certificate issued to the attorney was owned by Bartol Sikich on June 1, 1935, and that he was also at that time the owner of the 60 shares represented by the certificate theretofore issued to him (R. 13).

There was no finding as to the ownership of any stock by Mrs. Sikich. It is found that she has been a *holder* of stock in the corporation ever since its organization, and that when the special findings were signed, viz.: July 25, 1941, a daughter, Carolyn Sikich, was the *holder* of two shares (Finding 70, R. 119).

As heretofore shown, Bartol Sikich conveyed all the real estate owned by him February 8, 1932, to the Realty Company (R. 11).

He also transferred, assigned and delivered to the Realty company all his personal property such as notes, bonds and other evidences of indebtedness. Thereafter when he purchased real estate he caused the title to be placed in the name of the Realty company, and when he secured notes, bonds, etc., he transferred and delivered some of them to the Realty company and some to his wife.

It is the respondent's contention that the Realty company and Mrs. Sikich held this property under a secret trust for the benefit of Bartol Sikich, and that no court other than a state court had jurisdiction of a suit to establish such holding and the character of the title to such property as was held by the Realty company and Mrs. Sikich.

A Similar Case.

A somewhat similar situation arose in *Harris* v. *First Nat. Bank,* 216 U. S. 382, 54 L. Ed. 528, where the court reviewed several sections of the Bankruptcy Act, and held that the case did not come within any section giving the referee or federal courts jurisdiction. The judgment of the district court sitting as a court of bankruptcy, dismissing the action was affirmed.

The court reviewed the *Bardes Case,* 178 U. S. 524, to show that the case did not come within the provisions of Section 60 (b), Section 67 (e), and in answer to the contention that it came within the provisions of Section 70, Act of 1903, the court at page 385 said:

> "Assuming for this purpose that actions may be brought by trustees in courts of bankruptcy in cases coming within the terms of section 70, subdivision e, without the consent of defendant, we do not think the present action is one of that character, * * * The petition seeks to recover property held by the bank, if the allegations are true, which belonged to the bankrupt, and consequently passed to the trustee as the representative of the bankrupt's estate. The recovery sought is of property held for the bankrupt estate, which the defendant wrongfully refused to surrender. The district court was right in denying jurisdiction, and its judgment is affirmed."

In re Sections 107 (e) and 11 (a-4), Title 11 USCA.

The case at bar does not come within the provisions of Section 107 (e) for the reason that the deed conveying the real estate to the Realty company and the recording thereof, was not made within four months of bankruptcy. Neither does it come within the provisions of Section 110 (a-4), relied on by the petitioners, and, if it did, the

state court had jurisdiction under the express provision of subsection e of said Section 110, which gave federal courts concurrent jurisdiction with state courts.

Petitioners continually ignore the fact that federal courts are courts of limited jurisdiction. The title to the real estate and other property mentioned in the complaint was alleged to be held by the Realty company and by Emma Sikich, and to be in their possession under adverse claims of ownership. In other words, they were holding the title and possession under a secret trust for the benefit of Bartol Sikich, and no court other than a state court had jurisdiction to determine the character of that holding.

Petitioners do not seemingly recognize that there is a distinction between "proceedings in bankruptcy" and "controversies arising out of bankruptcy."

False Premise.

Petitioners have set up a straw man and proceeded from a false premise by not accurately stating the facts, and then assuming that the claims of the Realty company were only colorable. They do not contend that the claims of Mrs. Sikich were merely colorable.

This question of jurisdiction has been so conclusively decided by this Court as not to leave the question open to further argument.

Mitchell v. *McClure*, 178 U. S. 539, 44 L. Ed. 1182, and *Hicks* v. *Knorst*, 178 U. S. 541, 44 L. Ed. 1183, which were decided on the strength of the *Bardes Case*.

This Court in *Jaquith* v. *Rowley*, 188 U. S. 620, 625, 47 L. Ed. 620, 623, speaking of the *Nugent Case* cited by the petitioners said:

> "In other words, *Nugent's Case* simply holds that, where the agent holds money belonging to the bankrupt, to which he makes no claim, but simply refused to give up the property, which he acknowledged belonged to the bankrupt, the bankruptcy court had had power, by summary proceedings, to order him to deliver such property to the trustee in bankruptcy."

The amendment of 1903 served to confer jurisdiction on the district courts in certain classes of cases. Jurisdiction in all other cases was left where it was under the Act of 1898. A suit not in the classes mentioned in the amendment of 1903, "can be maintained in a federal court only if the bankrupt might have brought it there."

> *Rockmore* v. *New Jersey Fidelity, etc. Co.*, 65 Fed. (2) 341, 343.

As said by the court in the *Rockmore Case* just cited, page 343:

> "But the present suit is not 'proceeding in bankruptcy' relating to property in the actual or constructive possession of the trustee. It is rather an ordinary suit between the trustee and an adverse claimant."

This Court in *Wood, Trustee,* v. *A. Willets Sons, etc. Co.*, 226 U. S. 384, 67 L. Ed. 264, said, "The special exceptions exclude all others."

If it be assumed that the conveyances to the Transfer Realty Company were fraudulent, the referee had no jurisdiction, but the suit could have been brought in either a state court or in the federal district court. *Weidhorn* v. *Levy*, 253 U. S. 268, 64 L. Ed. 898.

The Circuit Court of Appeals in *Lowenstein* v. *Reickes*, 60 Fed. (2) 933, 935, said:

> "Since the trustee is suing in the right of the bankrupt, the jurisdiction is governed by section 23 of the bankrupt act (14 USAC Sec. 46). Such suits must be brought in the court where the bankrupt might have brought them except when the defendant consents or where the recovery may be had under sections 60b, 67e, or 70e (11 USAC sections 96b, 107e, 110e). The bankrupt could not have maintained this suit in a federal court for he and his wife, the defendant, are citizens of the same state."

Petitioners continually ignore the fact that federal courts are courts of limited jurisdiction, while the circuit courts of Indiana are courts of general jurisdiction, and that a trustee in bankruptcy is not entitled to sue in a federal court merely because he is such a trustee.

Point 6.

Addressed to Reasons A, B and C and Points A, B and C of Argument.

Summary.

The judgment sought to be reviewed is not in conflict with the cases cited by petitioners, and for that reason they are of no controlling influence.

* * * * *

Petitioners have cited six cases which they contend the judgment sought to be reviewed is in conflict. They have made no attempt to show any conflict. That burden they would cast on someone else. We have carefully read each of the cited cases, and confidently assert the judgment of the state court is not in conflict with any of them.

We will review these cases in the order cited. The first four relate to Reason A for allowance of the writ, and Point A of petitioners' argument.

1. *Mueller* v. *Nugent* (erroneously cited *Miller* v. *Nugent*), 184 U. S. 1, 46 L. Ed. 405.

There William Nugent, a son of the bankrupt, was in possession of money belonging to the bankrupt. He made no claim that the money was his. He was ordered by the referee to show cause why he should not pay it to the trustee. The order of the referee was confirmed by the district court, reversed by the Circuit Court of Appeals, while this Court reversed the last judgment and affirmed the judgment of the district court. This Court on pages 13, 14, said:

> "The real question was whether the order of October 16, as confirmed by the district court was a lawful order. It was to be determined as a mere question of law on the facts found that the money belonged to the bankrupt's estate, and was then in Nugent's possession as the bankrupt's agent, he asserting no adverse claim * * * ."

And on page 16 this Court said:

> "In this case, however, respondent asserted no right or title to the property before the referee, and the circumstances under which he held possession must be accepted as found by the referee and district court."

In the case at bar, it was alleged that the property in question had been transferred, assigned and delivered to the Realty company and to the wife of the bankrupt. That they were in possession of it, under an adverse claim of ownership.

2. *Whitney* v. *Wenman,* 198 U. S. 591, 49 L. Ed. 1157.

That was a plenary action in equity by a trustee in bankruptcy commenced in a district court to determine rights in property alleged to have come into the possession of the court of bankruptcy as property of the bankrupt. The facts alleged disclosed that the receiver in bankruptcy, who had come into possession of the property, had permitted the defendant to take possession from him, and thereafter the defendant claimed to hold the property adversely to the trustee in bankruptcy. The district court dismissed the action for want of jurisdiction. The contention there was that the amendment of 1903 did not enlarge the jurisdiction of the district court so as to give the bankruptcy court jurisdiction of a plenary suit by a trustee seeking recovery of property which had been taken from the possession of the bankrupt after adjudication. This Court held that the amendment of 1903 had nothing to do with the case, as the district court sitting as a court of bankruptcy always had jurisdiction of such a proceeding under the Bankrupt Act of 1898, as originally enacted.

3. *Robertson* v. *Howard,* 229 U. S. 254, 57 L. Ed. 1174.

Here a state court had held a sale of property by a trustee in bankruptcy was void. This Court reversed that judgment. There is nothing in that case to support petitioners' contention.

4. *Tauble-Scott-Kitzmiller* v. *Fox,* 264 U. S. 426, 68 L. Ed. 770.

We have already discussed this case, and will not add anything to that discussion. The Supreme Court of Indiana thought it was sufficient authority to warrant it in affirming the judgment of the trial court.

The remaining cases relied upon by petitioners, in support of Points B and C, are as follows:

5. *Thompson* v. *Fairbanks,* 196 U. S. 576, 49 L. Ed. 577.

There one Moore had been adjudged a bankrupt. Thompson as trustee of the bankrupt estate brought suit in a state court to recover from a mortgagee of the bankrupt, the proceeds received from a sale of the mortgaged property, such sale having been made under the terms of the mortgage. Moore was the owner of a livery stable and years before bankruptcy had given a mortgage to Fairbanks to protect him against loss by reason of having become security for the bankrupt. The mortgage covered after-acquired property. Under the laws of the state (Vermont) where the mortgage was executed, the mortgage became a lien on after-acquired property when possession was taken of it under the mortgage. The mortgagee took possession under his mortgage and sold the property. The trustee contended that the taking possession within four months of bankruptcy constituted a preference. The court held against the contention of the trustee. No question of jurisdiction was involved, and the action was in a state court.

6. *Coder* v. *Arts,* 213 U. S. 223, 53 L. Ed. 772.

Arts filed a claim against the bankrupt estate and asked that his rights under a certain mortgage given by the bankrupt be preserved. The property was in the possession of the trustee. The claimant voluntarily submitted himself to the jurisdiction of the court sitting as a court in bankruptcy. The question there was whether the giving of the mortgage constituted a preference. No question of jurisdiction or fraud was involved. This

Court in disposing of the case did refer to Section 67 e of the Bankruptcy Act. But the case at bar is not an action under that section.

Petitioners in citing these cases are simply grasping at straws to hold up their straw man.

Point 7.

Addressed to Petitioners' Argument Points A, B and C.

Summary.

The court will not assume jurisdiction of a petition for a writ of certiorari when there is no substantial question presented. Nor will it assume jurisdiction, though a federal question is involved, if the judgment of the state court is correct, as the assumption of jurisdiction would be a useless thing.

* * *

This Court is committed to the doctrine that a real and substantial question must be involved and is essential to the exercise of jurisdiction. The cases so holding are too numerous for citation. We quote from a few of them.

Hamblin v. *Western Land Co.*, 147 U. S. 331, 332, 37 L. Ed. 267, 270.

"A real and not a fictitious, federal question is essential to the jurisdiction of this court over the judgment of state courts."

"There must be a real substantial question, on which the case may be made to turn."

St. Joseph I. & R. Co. v. *Steele,* 167 U. S. 659, 662, 42 L. Ed. 315, 316.

Bare Assertion of Federal Question Not Sufficient.

> "But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction 'There must be a real substantive question on which the case may be made to turn, that is,' a real, and not a merely formal, Federal question is essential to the jurisdiction of this court."
>
> *Equitable Life Assur. Soc.* v. *Brown,* 187 U. S. 308, 311, 47 L. Ed. 190, 192.

And continuing the quotation, the court in the same connection said,

> "if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail."

Burden on Petitioners.

The burden is on the petitioners to show that a real, substantial federal question is involved, and not on the respondent to show that the question involved is not real and substantial.

Question of Jurisdiction Foreclosed.

That the state court had exclusive jurisdiction of the case at bar has heretofore been so explicitly decided by this court in the following cases as to leave no further controversy on the subject:

Harris v. *First Nat. Bank,* 216 U. S. 382, 54 L. Ed. 528;

Mitchell v. *McClure,* 178 U. S. 539, 44 L. Ed. 1182;

Hicks v. *Knorst,* 178 U. S. 541, 44 L. Ed. 1183.

And if it be assumed that the state court did not have exclusive jurisdiction, we then assert that it has been definitely decided by this Court that it had concurrent jurisdiction with the district court.

This Court in the much litigated case of *Steelman, Trustee,* v. *All Continent Corp.,* 301 U. S. 278, 81 L. Ed. 1085, sustained the right of the trustee to maintain a similar suit in the state court of New Jersey:

> "A plenary suit (said the court, p. 287) may be brought with the trustee in control to ascertain the legal and equitable interest in All Continent's assets, and also in its shares of stock."

And continuing on page 287, the court said:

> "The suit in the New Jersey Court of Chancery, which the court below has erroneously characterized as one that should be restrained because brought after notice of the suit in Pennsylvania, will supply an appropriate and convenient medium for the litigation of these issues if it is permitted to go forward."

Hence, if the state court had either exclusive jurisdiction, or concurrent jurisdiction with the federal district court, it did not err in assuming jurisdiction and in overruling the motions to dismiss, and its judgment was correctly affirmed by the Supreme Court of the State. No real or substantial federal question is shown to exist, and the petition for certiorari should be denied for that reason.

Point 8.

Addressed to Petitioners' Argument
Points B and C.

Summary.

When the case does not come within the terms of the Statute of Frauds and Perjuries, it is not necessary to allege or prove fraudulent intent. Nor is it necessary that the court find that there was any active or positive fraud.

* * * * *

It appears to us that this question relates to the merits of the case rather than to the question of jurisdiction of the trial court, or of this court to grant a writ of certiorari. But since the petitioners have undertaken to present the question relating to the failure to allege active and positive fraud, and the failure of the court to find positive fraud, we will undertake to show that it was not necessary to allege or prove such fraud.

Petitioners' Argument.

Petitioners in their argument assume that since some of the real estate was conveyed to the realty company more than three years before adjudication in bankruptcy, that the trustee can reach such property only through an action to set aside such conveyance as having been made with an intent to hinder, delay or defraud creditors. And in support of their contention they cite *Schwegman* v. *Neff*, 218 Ind. 63, and *Phelps* v. *Smith*, 116 Ind. 387, cases which come within the terms of the Indiana Statute of Frauds. We have no quarrel with either of those decisions.

Statute of Frauds Not Applicable.

The case at bar does not come within the Statute of Frauds. Neither does it come within the provisions of U. S. C. A. Sec. 107 e, or Sec. 110 (a-4) mentioned by petitioners. This case comes within the law as announced by the Supreme Court of Indiana, in *Leader Pub. Co.* v. *Grant Trust Co.*, 182 Ind. 651, 660. Counsel there as here, contended that the special finding was not sufficient to sustain the conclusions of law, because there was no finding that certain leases were fraudulent.

In denying that contention the court at page 660, said:

> "This contention has for its basis the provision of section 21 of the statute of frauds and perjuries of this state, which provides that the question of fraudulent intent in all cases arising under the provisions of this act shall be deemed a question of fact, and the many decisions of this court not necessary to set forth herein that in cases involving that law fraud must be found and stated in the special findings as a substantive, ultimate fact. But these decisions do not control the question now before us. It has been held that section 21 does not apply where the rights involved do not depend on the statute of frauds. It is not applicable to such cases as exhibited by the facts above stated which present a case of constructive fraud. Constructive fraud, or legal fraud arises by acts or course of conduct which, if sanctioned by law would, either in the particular case, or in common experience, secure an unconscionable advantage, irrespective of the existence of evidence of actual intent to defraud.
>
> "It is where the law infers fraud from the relationship of the parties and the circumstances which surround them independent of the intention. In actual fraud intent is an element of prime importance, whereas in constructive fraud it is of no significance. Fraud in law is what the law con-

demns from all the facts and circumstances surrounding the transaction and is synonymous with constructive fraud."

The above quotation is in harmony with the statement of the Circuit Court of Appeals in *Edward Finch Co.* v. *Robie,* 12 Fed. (2) 360, 363, where the court said:

"The question of fraud is not important, in view of our conclusions. While it is indicated there was no actual fraud as to creditors because the claims now filed were not in existence when the transfers of the property were made, it might be suggested with some force that the entire scheme and purpose of the organization and carrying on of these corporations, eventually to result in wrong to others is so lacking in good faith as to constitute a legal fraud."

To the same effect is *Cotterell* v. *Koon,* 151 Ind. 182, 185-6.

Not Necessary to Find Fraud As an Ultimate Fact.

There is another line of cases dealing with the necessity of a special finding to state fraud as an ultimate fact. Thus when the facts found lead to but one conclusion there is no need for a statement of the ultimate fact.

Mount v. *Board of Commissioners,* 168 Ind. 661.

Indeed the statement of an ultimate fact in a special finding may be disregarded when the primary facts found are such as to lead to a different conclusion. As said in *Smith* v. *Wells Mfg. Co.,* 148 Ind. 333:

"When the primary facts are stated and they lead to but one conclusion, the statement of the ultimate fact, may well be disregarded since the

statement of the ultimate fact is required only where, from the primary facts, either of two conclusions may reasonably be drawn."

The same rule was announced in *Smith* v. *The Wabash R. Co.*, 141 Ind. 92, 105, where the court said:

"But, if the facts found in a special verdict are such that the court can adjudge as a matter of law that the injured party was or was not guilty of contributory negligence, then the finding of such ultimate fact by the jury, whatever it may be, will be disregarded by the court."

In the recent case of *American Income Ins. Co.* v. *Kindelsparker,* 102 Ind. App. 495, the court said:

"Where the primary facts found lead to but one conclusion, or where such facts are of such a character that they necessitate the inference of an ultimate fact, such ultimate fact will be treated as found by the trial court and sufficient on appeal."

Law of Forum Controls. No Federal Question Presented.

The Supreme Court of Indiana in its opinion in the case at bar, referring to the complaint, said:

"The complaint alleged that the bankrupt owned valuable real estate at the time of his adjudication; that title to said land was in the name of said corporation, which was a dummy, organized and used by the bankrupt to hold property for him; and that the corporation and the bankrupt's said wife claimed to be the owners of said real estate. There was a prayer that the trustee be adjudged the owner of said property and that the corporation be required to account for and convey the same to the plaintiff." (R. 160.)

And further along in the opinion, and in answer to the contention of the petitioners that, since the complaint

alleged that the bankrupt owned and was entitled to the possession of the real estate at the time of the adjudication and that the interest and title of the corporation and of the bankrupt's wife were colorable only and not substantial, the court said:

> "The appellants' premise is too broad. * * * While the trustee asserted and the trial court found that he was the equitable owner and entitled to possession, actual possession as well as indicia of the right to possession, was in another legal entity. This is disclosed by the complaint as well as by the fact that the corporation and the bankrupt's wife did not disclaim any interest in the property, but resisted the action all the way to this court under a state of issues broad enough to permit any defense." (R. 160, 161.)

And they are in this court resisting the trustee's claim of ownership, under an adverse claim of ownership. In addition to the real estate the complaint alleged that the corporation and the bankrupt's wife were in possession of certain personal property belonging to the bankrupt, under an adverse claim of ownership, and also of the income therefrom, and prayed for an accounting.

In *Bullis* v. *O'Breine,* 195 U. S. 606, 617, 49 L. Ed. 340, 345-6, the State court refused a trial by jury. On page 617, this court said:

> "But it is unnecessary to further consider questions of practice peculiar to the jurisdiction where the judgment was rendered. Whether the complaint sufficiently charged fraud to warrant the judgment given is not a federal question."

We also call attention to *Forsyth* v. *Vehmeyer,* 177 U. S. 177, 180, 44 L. Ed. 723, 724-5. There Vehmeyer had recovered a judgment in a state court in Illinois. The record relating to that judgment had been destroyed

in the great fire of 1871. He later commenced an action on that judgment. Forsyth pleaded a discharge in bankruptcy. The state court held that the judgment was founded on fraud and was not affected by the discharge in bankruptcy, and in so doing at page 180, said:

> "We understand by this opinion that the court held the first action was for fraud and deceit, and that the plaintiff was bound to have proved the fraud alleged in the declaration in order to maintain the action. This decision involved no federal question."

So in the case at bar, whether the real estate standing in the name of the Realty company and whether the notes, bonds and mortgages which had been transferred, assigned and delivered to the bankrupt's wife belonged to the bankrupt, did not present any federal question. No question was raised in the trial court or in the Supreme Court of the State as to the sufficiency of the complaint to sustain the judgment given, and no attempt has been made to point to any finding of the court disclosing want of jurisdiction.

Point 9.

Addressed to Petitioners' Point C. Page 18.

Summary.

A trustee in bankruptcy may maintain an action against any person, including the bankrupt, to recover a judgment for money or property belonging to the bankrupt estate, which such persons have collected and appropriated to their own use.

* * * * *

No Question Presented.

Respondent for the reasons heretofore stated, insists that no question is presented, as the petition does not state facts sufficient to confer jurisdiction to grant the writ.

In addition to the objections heretofore stated, respondent says that there has been no attempt, in either the petition or supporting brief, to show that any question was raised in the trial court or in the Supreme Court of the State, as to the right of the trustee, under the averments of the complaint and the facts as found by the court to recover a personal judgment against the bankrupt and his wife.

We have read and re-read the petition and brief time after time to see if we could find where such a question had been presented, and we assert advisedly that there is no showing that such a question was presented, and it is too late to raise such a question in this court.

Reference to Personal Judgment.

The first place where reference to a personal judgment is made is on page 2 of petition, near bottom of page, where it is said:

> "It was on these findings that the court rendered a judgment against the petitioners Bartol Sikich and Emma Sikich in the sum of $17,411.80."

The next reference to the personal judgment is near the bottom of page 5 where petitioners venture a guess at the theory adopted by the trial court in reaching such judgment, and use the following statement:

> "This theory being sustained by a personal judgment only against Bartol Sikich and Emma Sikich

which personal judgment is based upon the income of the property conveyed by Bartol Sikich to the Transfer Realty Company Inc."

This guess and statement is about as nearly correct as their statement of the averments of the complaint. An analysis of Finding 62 (R. 89-99) discloses that the $17,411.80 is made up as follows:

Income from Real estate conveyed to Realty Co. February 8, 1932	$ 4,121.05
Income from property purchased by Bartol Sikich after February 8, 1932	4,072.21
Cash received from other sources	8,171.73
Interest	3,509.50
	$19,874.49
Less a credit of	2,462.69
	$17,411.80

The next reference to earnings from real estate is at top of page 8. Then on page 10 under Reason C is a statement as to what the Supreme Court of Indiana decided. In Specification of Error 3 it is said that the Supreme Court of Indiana erred in holding Bartol and Emma Sikich personally liable for the earnings of real estate conveyed to the Realty company. The earnings from real estate is again referred to in Point C, page 14, and lastly in Point C on page 18.

It is not possible to follow petitioners' argument. It seems to be based upon the theory that the court erred in not rendering a personal judgment against the Transfer Realty Company, because part of the money and income was received as earnings, such as rent received

for real estate where the title was in the name of the company, although the complaint alleged and the court found such property belonged to the bankrupt. It is argued that as the "actual possession of the properties was in the Transfer Realty Company, Inc., then it was entitled to the earnings of the real estate and the petitioners, Bartol Sikich and Emma Sikich, could not be liable."

There is about as much logic in this statement as there would be in the statement that a cow has four legs, hence all animals with four legs are cows. If the property belonged to the bankrupt (a fact involving no federal question), it passed to the trustee who was entitled to the income, and the question as to who was entitled to the income reverts back to the question, Did the bankrupt own the property, or was it owned by the company and Mrs. Sikich?

In re Fraud.

Petitioners appear to be imbued wtih the false idea that actual, positive fraud involving moral turpitude must be alleged and proven before a state court can pierce the veil of a corporate entity. Such is not the law, and if it were the law, it would not necessarily involve a federal question.

When the scheme and purpose of organizing a corporation is so lacking in good faith and results in wrong and injustice to others the question of positive fraud is not important.

The trial court evidently was satisfied with the law as announced by this Court in *United States* v. *Reading Co.*, 253 U. S. 26, 63, 64 L. Ed. 760, 781, that

"the court will look through the form to the realities of the relation between the companies as if the corporate agency did not exist, and deal with them as the justice of the case may require."

And as stated in *Chicago, M. & St. P. R. Co.* v. *Minneapolis Civic Ass'n.*, 247 U. S. 490, 501, 62 L. Ed. 1229, 1237:

"In such a case the court will not permit themselves to be blinded or deceived by mere forms of law, but, regardless of fictions will deal with the substance of the transaction involved as if the corporate agency did not exist and as the justice of the case may require."

This court in numerous decisions, various circuit courts of appeals and the courts of every state where the question has been raised have approved the doctrine that the corporate entity will be disregarded whenever justice and fair dealing requires it.

Cases Cited By Petitioners.

Petitioners on page 10 of their petition say the decision of the state court is in direct conflict with *Thompson* v. *Fairbanks*, 196 U. S. 516, and *Coder* v. *Arts*, 213 U. S. 223. They have not attempted to show wherein there is any conflict. They are willing to cast that burden on the court. We have heretofore, under Point 6 of this argument, analyzed these cases and shown that they are of no controlling influence.

Form of Decree.

A court of equity may adapt its relief to the exigencies of the case, and, when nothing more is required, may order a sum of money to be paid to the plaintiff, or give

him a personal judgment therefor to be enforced by execution.

Baily v. *Hornthal,* 154 N. Y. 648, 49 N. E. 56, 60, 61 A. S. R. 645;

Grigg v. *Hanna,* 283 Mich. 443, 278 N. W. 125, 132.

"Although the relief now to be granted to the defendant is a money judgment, such as would be available in an action at law, it is familiar practice to grant such relief in an action in an equity proceeding in appropriate cases."

Giles v. *Giles,* 293 Mass. 495, 200 N. E. 378.

As said in the *Baily-Hornthal Case, supra,* "under the circumstances a money judgment was precisely the relief a court of equity should have rendered" in the case at bar.

Petitioners' Points B and C Relate to the Merits and Not to Jurisdiction.

Respondent insists that Points B and C in petitioners' argument have nothing whatever to do with jurisdiction of the subject matter of the action. The subject matter of the action was the recovery of property belonging to the bankrupt estate in the possession of third parties under adverse claims of ownership. The question of accounting for rent and income received after bankruptcy and converted, was incidental to and depended on a recovery of the property alleged to have been the property of the bankrupt at time of adjudication.

If there had been no judgment in favor of the trustee on that issue there could have been no conversion of the income and consequently no personal judgment for conversion.

The fact that Bartol Sikich was discharged as a bankrupt did not render him immune from liability for subsequent liability for injury or damage to property belonging to the bankrupt estate. Suppose the bankrupt had been the owner of an automobile, the certificate of title and possession being in his wife, and she had claimed to own it adversely to the trustee of the bankrupt estate. And suppose further she and her husband while using the automobile in connection with her business had, through their joint negligence, wrecked it beyond possibility of repair, would any one contend they would not be jointly liable to the trustee for the value of the automobile? We know of no law exempting a bankrupt from liability for conversion after his discharge in bankruptcy. The evidence may have disclosed that the bankrupt and his wife entered into a conspiracy to appropriate the income and proceeds of the property found to belong to the bankrupt estate by using it in connection with the business known as Transfer Corner Inc., which was found to belong to her, and Transfer Corner had also been adjudged a bankrupt, or suppose they entered into a conspiracy to use such income in their common defense of this and other litigation in which both of them were interested. Might not a personal judgment have been recovered for the money so used? The evidence is not in the record so it must be presumed that it was sufficient to sustain the finding that Bartol Sikich and his wife converted the money to their own use and benefit. Whether that judgment was for too large an amount is of no moment. It has nothing to do with the question of jurisdiction to issue the writ of certiorari.

A person not a party to the bankrupt proceedings, who claims property owned by the bankrupt, at the time of bankruptcy, is in possession thereof under an adverse

claim of ownership, and who after bankruptcy receives an income from such property as rent or interest, or who converts any of such property into money and appropriates such money to their own use and benefit, and any other persons, including the bankrupt, who aids and assists in the collection and conversion of such income from property of the bankrupt, is liable to a personal judgment for the amount so collected and appropriated.

Levinson v. *Greene,* 296 Fed. 588;
Greene v. *Levinson,* 123 Wash. 370, 212 Pac. 562, certiorari denied 262 U. S. 750, 67 L. Ed. 1214;
Sheldon v. *Parker,* 66 Neb. 610;
Scott v. *Gillespie,* 103 Kan. 746, certiorari denied in 249 U. S. 606, 63 L. Ed. 799.

Point 10.

Damages for Delay.

Summary.

Damages may be awarded when it appears that an appeal has been taken for delay. Rule 30, par. 2.

* * * * *

Respondent insists that the petition and supporting brief clearly discloses that these proceedings are not taken in good faith. That no good faith effort has been made to accurately and adequately present the true situation, knowing that if the true situation were set out in the petition that it would show no jurisdiction to issue the writ. We also insist that no showing of the existence of a real substantial question has been presented. Bartol Sikich was adjudged a bankrupt more than nine years ago. This action was commenced more than eight years ago. The judgment in the trial court was rendered July 25, 1941. The judgment of the Supreme Court of Indiana, was rendered May 20, 1943.

The petitioner, Emma Sikich, has had the use of our property for more than nine years. She personally and through her husband has disposed of some of it and appropriated the proceeds thereof to their own use and benefit. She personally and through her husband has collected all the rent from real estate belonging to the respondent. She and her husband have appropriated all of that to their own use. They have had money in abundance, knowing that the respondent had none. They, with the use of our money, can afford to litigate and prosecute these proceedings well knowing respondent cannot.

The day of judgment has arrived and we insist that damages should be awarded within Rule 30, Paragraph 2 of this Court in such an amount as will partially take care of the expenses incurred by respondent in this matter.

Only Way to Prevent Frivolous Appeals.

As was said by this Court in *Whitney* v. *Cook,* 99 U. S. 607, 25 L. Ed. 446, and quoted in *City of Chanute* v. *Trader,* 132 U. S. 210, 213, 33 L. Ed. 345, 346, "the only way to discourage frivolous appeals and writs of error is by way of our power to award damages."

In *Deming* v. *Carlise Packing Co.,* 226 U. S. 102, 109-110, 57 L. Ed. 140, 144, 145, a penalty of five per cent was awarded. In *Slaker* v. *O'Connor,* 278 U. S. 188, 193, 73 L. Ed. 258, an award of $150.00 was made. In *Wagner* v. *Electric Mfg. Co.,* 262 U. S. 226, 67 L. Ed. 961, 964, an award of $1,500.00 was made.

In view of the circumstances surrounding these proceedings from the very beginning and the frivolous

character of the petition filed in this Court, it is very evident that the filing of the petition in this Court is for purpose of delay, and to hold on to the property and money rightfully belonging to the bankrupt estate.

The trial court found and adjudged that petitioners should account to the respondent for $17,411.80 on account of money received and appropriated. That judgment was rendered July 25, 1941. By the appeal to the Supreme Court of the State and to this Court, respondent has been delayed in the settlement of the bankruptcy proceedings. He has been deprived of the possession of the property and money rightfully his, while others have been in possession thereof and enjoying the fruits thereof.

Respondent respectfully submits that the petition for the writ of certiorari should be denied and that he be awarded damages in a sum equal to ten per cent of the amount of the money judgment.

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